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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

JOSEPH A. HUMBLE,

Plaintiff and Appellant,

v.

VETERINARY MEDICAL BOARD OF
CALIFORNIA,

Defendant and Respondent.

C058960

(Super. Ct. No. 07CS00757)

Following an accusation issued by the Veterinary Medical Board of California (Board), an administrative law judge (ALJ) issued a proposed decision that sustained a single count of negligence against Joseph A. Humble, stayed revocation of his veterinary license, and placed him on probation for two years. The Board adopted the proposed decision, but reduced Humble's probation period to one year.

Humble appeals following the denial by the trial court of his petition for writ of administrative mandate, in which he sought to vacate the Board's decision. Humble contends the trial court's ruling is not supported by substantial evidence,

the court erred in relying on the testimony of the Board's expert witness, and the case should be remanded for reconsideration of the penalty.

Finding no merit in any of these contentions, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Humble operates the Cutten Animal Health Center, a veterinary clinic in Eureka. Humble's clinic is the only one in Humboldt County that offers 24-hour "on call" emergency treatment. Humble's clinic offered three different levels of overnight care for its patients: (1) "hospitalization," (2) "intensive care," and (3) "24-hour critical care."

On February 2, 2004 (undesigned calendar references are to 2004), Terri Heddinger brought her seven-year-old male Labrador-mix dog, Baby, to Humble's clinic because he had not eaten in a few days, and was experiencing excessive thirst, vomiting, and diarrhea. Humble evaluated Baby, recommended a blood test, and started him on intravenous (IV) fluids. When Heddinger was advised of the three different levels of overnight care, she chose to have Baby treated as an "intensive care" patient. Heddinger understood "intensive care" to mean Baby would be receiving IV fluids and be monitored during the night. She would not have left Baby at the clinic had she believed her dog was not going to be observed during the night. Over the next three days, Baby's condition worsened. The dog passed away on February 5 at 11:55 p.m.

Following Baby's death, Heddingler filed a consumer complaint with the Board. The Board elected to file an accusation against Humble, alleging that his treatment of Baby constituted negligence in the practice of veterinary medicine.¹ A five-day hearing was held before ALJ Karen J. Brandt.

The Board's evidence

A. Baby's Monitoring

On February 2, at 6:15 p.m., Humble noted on Baby's chart that he was giving him "0.9% NaCl IV [fluids] 1000ml." He further noted, "Establish drip rate at 85ml/hour, monitor overnight."

On February 3 at 12:05 a.m., an entry was made to continue "[F]luids at 85ml/hour." The next observation was under the entry "AM" and it noted Baby was "dull, depressed, no improvement overnight, drip rate at 85ml/hour." It also included an assessment that Baby had liver disease and stated to "continue fluids at 85ml/hour."

The next observation was noted on February 4, under the entry "AM." It reported Baby's temperature, pulse, respiration, and medication being given. At 4:00 p.m., Humble wrote, "Monitor fluids at 85ml/hour." At 9:30 p.m. and 12:00 a.m., his notations indicated that Baby was growling in his kennel.

¹ The Board subsequently filed a first supplemental accusation alleging that Humble was also negligent in his treatment of a poodle named Daphne. However, the ALJ did not sustain those allegations, and Humble's treatment of Daphne has no bearing on this appeal.

On February 5, under the entry "AM," Baby was reported "Seizuring, paddling, soft foul brown diarrhea, [and] severely jaundiced." At 11:55 p.m., Baby expired.

Heddinger testified that, out of concern for Baby, she left a note on the clinic's front door at 1:30 in the morning on February 5. The note was still there when she returned at 7:30 a.m.

B. Expert Testimony

Dr. Ronald D. Schechter testified as the Board's expert witness. Schechter was a licensed veterinarian for over 40 years, an assistant professor at U.C. Davis School of Veterinary Medicine, and a partner in a four-doctor small animal practice group.

Schechter testified that in his opinion, Baby was left unmonitored for approximately seven and a half hours on three consecutive nights. He based this conclusion on the absence of any entries in Baby's chart from approximately midnight "until some undetermined time in the morning listed as a.m.," presumably when the staff arrived at 7:30 a.m. Schechter testified that it is standard practice that "if anything is to be done, it is to be written in the [patient's] record and initialed or signed." There is a "widely held understanding" that, depending on the severity of the case, intensive care would include "frequent observations with recording in the record as to what you found." If a procedure is not entered into the record, the standard practice is to assume that it was

not performed. Although there is no exact definition for "intensive care" in veterinary medicine, it would never involve leaving a patient unattended for a seven-and-a-half-hour period. Schechter testified that leaving a dog on an IV drip unmonitored for seven and a half hours overnight on three successive nights constituted professional negligence. In Baby's case, the dog "received no intensive care [for three nights], yet intensive care was in fact implied and charged for."

Humble's evidence

At the hearing, Humble testified that he treated Baby at "Level 2," as an "intensive care" patient. He testified he would "look in on Baby, just as [he] did other cases . . . [and] would check [Baby] at midnight, 2:00 o'clock, [and] maybe 4:00 o'clock in the morning." Humble testified that on two of the nights, he stayed with Baby until about midnight, went up to his quarters, and came down at "maybe 4:00 o'clock in the morning." He testified that he never left Baby alone unobserved for "more than maybe two hours at a time. Two to four hours at a time." When asked about the "A.M." reference in Baby's chart, Humble responded, "a.m. is fairly vague. If animals are changing, in other words . . . if the status is the same, I will rarely write times. It's just a morning observation, if the animal appears to be stable. If there appears to be changes, then I get more specific with times, so if there is just 'a.m.,' there probably was no change."

Humble's assistant, Jennifer McLean, testified that the doctor had checked on Baby in the middle of the night on February 4. She knew Humble checked on Baby "[b]ecause he always checks on critical cases throughout the night."

Humble called two experts, both of whom testified that Baby was a very sick dog. However, neither contradicted Schechter's testimony about the standard of care for intensive care patients.

ALJ's decision

The ALJ found "clear and convincing evidence . . . that [Humble] was negligent when he left Baby on an unmonitored [IV] drip for up to seven and one-half hours on three successive nights." The proposed order recommended that Humble's license be revoked, but that the revocation be stayed and Humble placed on two years of probation. The Board adopted the ALJ's proposed decision, but reduced the probation period to one year.

Trial court's decision

Humble filed a petition for writ of administrative mandamus in the trial court, seeking to set aside the Board's decision. (Code Civ. Proc., § 1094.5.) The trial court denied the petition. The court found Humble's testimony "lacking in specifics" and noted that there were no chart notes to support his testimony that he monitored Baby overnight. The court also found unpersuasive Humble's assertion that "a.m." meant only that there had been no changes during the night. The court concluded that "no monitoring at all for seven and a half hours

overnight is a violation of the standard of care in these circumstances." Exercising its independent judgment, the court found that the ALJ's findings were supported by the weight of the evidence.

DISCUSSION

I. Sufficiency of Evidence

When a trial court considers a petition for writ of administrative mandamus to challenge an administrative board's decision, the court must exercise its independent judgment. (Code Civ. Proc., § 1094.5; *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 811-812 (*Fukuda*); *Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 320.) Under the independent judgment test, the trial court must determine whether the agency's findings are supported by the weight of the evidence. (*Fukuda, supra*, 20 Cal.4th at pp. 808, 819-822; *Duncan v. Department of Personnel Administration* (2000) 77 Cal.App.4th 1166, 1174.)

On appeal, the reviewing court does not exercise independent judgment, but determines only whether the trial court's findings are supported by substantial evidence. (*Fukuda, supra*, 20 Cal.4th at p. 824.)

Humble challenges the sufficiency of the evidence to support the trial court's decision. We note preliminarily that this argument is not cognizable on appeal because Humble has failed to provide a balanced statement of the facts adduced at the administrative hearing. Humble's "Summary of Material

Facts" is completely devoid of facts supporting the Board's decision, and totally ignores Dr. Schechter's expert findings and opinions. The trial court's judgment is presumed to be supported by substantial evidence and it is the appellant's burden to demonstrate otherwise. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) To sustain this burden on appeal, an appellant's brief must set forth all of the material evidence bearing on the issue, not merely the evidence favorable to his side. If the appellant fails to do so, the claim of insufficiency of the evidence is forfeited. (*Ibid.*; *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1510.)

Despite the forfeiture, we have reviewed Humble's arguments and find them to be meritless, as we shall explain.

Humble first contends the trial court erred in sustaining the ALJ's finding of negligence because the standard of care for "intensive care" was not established by the Board's expert. He reasons that "[i]f the standard of care is not specified, it is impossible to find that [he] violated a nonexistent standard." Not so.

Humble submitted no expert testimony contradicting Schechter's opinion that leaving an intensive care patient unattended for seven and a half hours on three successive nights would fall below any reasonable standard of care. Indeed, Humble's own counsel conceded that such conduct *would* have constituted negligence. Therefore, the absence of an "exact" standard is irrelevant.

Humble also asserts the trial court erred in disregarding the "uncontroverted" testimony by him and his assistant that he never left Baby unmonitored for more than four hours.

However, "[t]he trial court is the sole judge of the weight and effect of testimony and of the credibility of witnesses, and is free to disbelieve them, even though they are uncontradicted, if there is any rational ground for doing so." (*Podesta v. Mehrten* (1943) 57 Cal.App.2d 66, 72.) "A reviewing court does not weigh the evidence again like a trier of fact to determine whether the reviewing court believes a witness or considers an inference to be reasonable. Likewise, the reviewing court does not weigh supporting evidence against contrary evidence to determine which is stronger, more likely, more reasonable, etc. Those comparisons and determinations are reserved to the trier of fact." (*Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 413.)

The ALJ found that "there was no trustworthy evidence to substantiate that [Humble] monitored Baby on a regular basis during each of the nights that Baby was in his clinic."

In its independent review,² the trial court correctly noted that "[t]his case turns on the credibility of Dr. Humble's

² Humble's suggestion that the trial court failed to exercise its independent judgment is patently incorrect. In summarizing its ruling, the trial court stated, "having exercised my independent judgment, I find the findings are supported by the weight of the evidence." The proper standard was utilized. (See *Gatewood v. Board of Retirement* (1985) 175 Cal.App.3d 311, 322.)

testimony that he monitored Baby overnight on three nights." The court then found that Humble's testimony was "lacking in specifics" and the testimony of his assistant was also "general." These findings make clear that both the ALJ and trial court found that Humble was not credible. That determination is binding upon this court. (See *California Teachers Assn. v. Governing Board* (1983) 144 Cal.App.3d 27, 37 (*California Teachers Assn.*))

Even Humble's predicate assertion that his testimony was "uncontroverted" misstates the law. "A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story." (*Camp v. Ortega* (1962) 209 Cal.App.2d 275, 282-283 (*Camp*)).

The record contains significant evidence casting doubt on Humble's general assertions that he habitually monitored Baby during the night. During the daytime hours, Humble always wrote short entries recording his observations of Baby's condition on the dog's chart. Yet the chart had no entries during the period from midnight to 7:30 a.m. for three consecutive nights. Schechter testified that in veterinary medicine it is widely understood that "intensive care" would include frequent observations with recorded findings, and that if something is not written into the patient's chart, it is assumed it was not done.

This impressive circumstantial and expert opinion evidence provided an impregnable basis upon which the trial court could discredit Humble's testimony and find merit in the ALJ's determination that he was not a credible witness.

II. Schechter's Testimony

Humble contends that the trial court erred in relying on Schechter as an expert witness. We are not persuaded.

Humble first argues that since Schechter was paid by the Board to review consumer complaints and determine whether to pursue a case, he acted as the Board's "adjudicator." Because Schechter had a pecuniary interest as an "adjudicator," Humble asserts that he "should have been disqualified based on the appearance of bias."

However, Humble never sought to disqualify Schechter or exclude his testimony at the evidentiary hearing. Hence, the argument that he should have been *disqualified* is forfeited. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 909-910.)

Humble next claims Schechter's opinions should have carried no weight because he was not an expert in the field of emergency veterinary medicine and his opinion on intensive care and monitoring was not based on personal experience.

These objections go to the *weight* of Schechter's testimony, not its admissibility. "It is within the exclusive province of the trier of fact to determine the credibility of experts and the weight to be given to their testimony." (*Francis v. Sauve*

(1963) 222 Cal.App.2d 102, 119.) Schechter was a licensed veterinarian with more than 40 years' experience, a partner in a veterinary group practice, assistant professor at U.C. Davis School of Veterinary Medicine, and publisher of numerous papers in major veterinary journals. Moreover, his opinion that it is below the standard of care to leave a severely ill dog unmonitored for seven and a half hours was *undisputed* by Humble's own experts. Thus, Schechter's opinion was not only persuasive, it was dispositive. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632 [fact finder is required to accept uncontradicted expert testimony as conclusive in professional negligence cases where the standard of care must be established by expert testimony].)

Humble finally contends that Schechter's testimony was unworthy of belief based on "alarming evidence" in the record of bias. This purported "evidence" is another veterinarian's opinion that Schechter's written report indicated "disrespect directed toward Dr. Humble," and Schechter's prior testimony "demonstrating disdain" for Humble in a previous disciplinary proceeding.

However, as the trial court noted, the fact that an expert gives unfavorable testimony toward a defendant in one proceeding does not necessarily mean that he would be biased in a subsequent proceeding. The bias of a witness is just *one* factor for the trial court to consider in determining the weight to be given to his testimony. (*Camp, supra*, 209 Cal.App.2d at p. 282;

Evid. Code, § 780, subd. (f).) The trial court's overall assessment of Schechter's credibility is not subject to being reweighed on appeal. (*California Teachers Assn.*, *supra*, 144 Cal.App.3d at p. 37.)

III. Remand

Humble asserts that if reversal is not ordered, we should remand for further proceedings because, in fixing the penalty, the Board inappropriately considered a prior violation of the Veterinary Medicine Practice Act (Bus. & Prof. Code, §§ 4811, 4883, subd. (i) [negligence]), which he alleges was later overturned on appeal.

In her February 2, 2007 written decision, the ALJ noted that Humble had "[t]wo prior citations . . . listed in the Accusation to 'determine the degree of penalty to be imposed on' [him]. [The Board] certified that Citation number 1553-C was issued to [Humble] on March 11, 2003, Citation number 1664-C was issued to [Humble] on July 23, 2004, and that both citations were paid in full on March 17, 2006." However, because *no* evidence of the substance of these citations was offered at the hearing, the ALJ found their existence "not particularly useful in determining the appropriate penalty in this matter."

The ALJ recommended placing Humble on probation for two years. The Board reduced the probation period to one year, hardly a vindictive punishment. "The propriety of a sanction imposed by an administrative agency is a matter resting in the sound discretion of that agency, and that decision will not be

overturned absent an abuse of discretion." (*Hughes v. Board of Architectural Examiners* (1998) 68 Cal.App.4th 685, 692.) No abuse is shown; hence, no remand is necessary.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

HULL, Acting P. J.

CANTIL-SAKAUYE, J.